Delays Caused By a Pandemic: Are They Compensable or Excusable?

During the negotiation process, contractors must carefully consider the allocation and of risk, attendant costs and possible delays.

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To supplement the famous words of Benjamin Franklin, "[I]n this world nothing can be said to certain except death and taxes" — and construction delays. (See Benjamin Franklin, Letter to Jean-Baptiste Le Roy, 1789.) While construction delays may not have been an issue as far back as 1789, they are certainly a frequent occurrence today.

As a result, contractors must understand the contractual effects of delays caused by external issues (such as adverse weather, labor strikes or pandemics) or caused by the owner or its representatives. Some of these delays are compensable, meaning the owner, or a third party, will compensate the performing party for delays to the project.

Other delays are merely excusable, meaning that the performing party will only receive extra time to perform. An owner will neither penalize nor compensate the delayed party for an excusable delay absent an express contractual provision to the contrary.

In light of the COVID-19 pandemic, it is critical for contractors to understand the distinction between compensable and excusable delays. When governors across the country suspended nonessential construction by issuing executive orders, such stoppages triggered the standard, but often forgotten force majeure clause in contracts. See, e.g., N.J. Exec. Order No. 122 (April 8, 2020).

The typical force majeure clause addresses delays due to unforeseeable events (such as pandemics). However, unless a contract specifically provides for compensation for unforeseeable delays (i.e., compensable delays), the performing party contractually will be restricted to additional time without the benefit of additional money (i.e., excusable delays).

Despite contractual limitations, contractors may turn to common law theories to seek additional compensation for delays. One such theory is constructive change, a theory which is predominantly invoked in connection with government contracts. Constructive change occurs when "a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the" contracting party. Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1325 (Fed. Cir. 2007).

In adjudicating a claim for constructive change, a tribunal will analyze the contractual language to determine each party's obligations and to see if the owner ordered more than the contract required. See Kiewit Infrastructure West Co. v. United States, 972 F.3d 1322, 1330 (Fed. Cir. 2020). Logically, pandemics will rarely give rise to constructive changes since they (a) never arise due to the fault of the owner; and (b) they seldom mean that the owner requires additional work.

A second theory to consider is that of "cardinal change," another staple in the arsenal of government contract defenses. "Under established case law, a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." Allied Materials & Equip. Co. v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978).

Like constructive change, cardinal change requires an action on the part of the owner. Thus, pandemics are not going to result in a cardinal change in the contractor's scope.

Ebola shutdown

In the recent case of Pernix Serka Joint Venture v. Dep't of State, CBCA 5683, 20-1 BCA ¶ 37,589, the Civilian Board of Contract Appeals (CBCA) addressed the doctrines of constructive change and cardinal change in the context of a pandemic — the Ebola crisis of 2013.

Pernix involved a dispute between the federal government and a contractor. Specifically, the U.S. Department of State ("DOS") contracted with Pernix Serka Joint Venture to construct a rainwater and capture system in Freetown, Sierra Leone. Unfortunately, Pernix's work coincided with the Ebola outbreak in 2013, forcing Pernix to withdraw temporarily from the project.

Notably, the government did not order Pernix to withdraw from the project. Fearing for the safety of its personnel, the contracting firm made the independent, reasonable and justifiable decision to shut down. Pernix eventually returned to Sierra Leone in 2015, but incurred a total of $1,255,759.88 in expenses because of the outbreak.

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